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Before the
FEDERAL COMMUNICATIONS COMMISSION
Washington, DC 20554

Petition for Expedited Rulemaking to Establish Reporting Requirements and Performance and Technical Standards for Operations Support Systems	)))))	RM 9101

REPLY COMMENTS OF THE COMPETITIVE TELECOMMUNICATIONS ASSOCIATION

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July 30, 1997

No. of Copies rec'd 024

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The Competitive Telecommunications Association ("CompTel"), by its attorneys, hereby submits these reply comments[1] on the petition of LCI International Telecom Corp. ("LCI") and CompTel for an expedited rulemaking ("Petition") concerning the requirements governing operations support systems ("OSS") established in the Commission's *Local Competition Order*.[2]

I. INTRODUCTION AND SUMMARY

As demonstrated herein, there is broad support in the record among new competitors for the action requested in the *Petition* of LCI and CompTel. There is also

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[1] Pursuant to the Commission's June 10, 1997, Public Notice (DA 97-1211), reply comments originally were due on July 25, 1997. On July 18, 1997, the Commission extended the reply comment date to July 30, 1997.

[2] *Implementation of the Local Competition Provisions in the Telecommunications Act of 1996*, First Report and Order, CC Docket No. 96-98, 11 FCC Rcd 15499 (1996) ("Local Competition Order"), *motion for stay denied*, 11 FCC Rcd 11754 (1996), Order on Reconsideration, 11 FCC Rcd 13042 (1996), Second Order on Reconsideration, 11 FCC Rcd 19738 (1996), *aff'd in part, vacated in part sub nom. Iowa Utilities Bd. v. FCC* and consolidated cases, No. 96-3321 et al., slip. op. (8th Cir. July 19, 1997) ("*Iowa Utilities Board*").

support among those public utilities commissions that participated. Moreover, the U.S. Court of Appeals for the Eighth Circuit's recent decision on the local competition rules adopted by the Commission last August confirms the authority of the Commission to define the scope of the incumbent local exchange carriers' ("ILECs'") obligations to provide OSS functions to requesting telecommunications carriers — purchasers of unbundled network elements, resellers, and facilities-based carriers — through rules such as those sought by the *Petition*. The Court's decision also leaves intact the Commission's ability under Section 208 and Title V to enforce any OSS rules it adopts against any ILEC operating subject to Section 251(c) of the Communications Act of 1934 ("1934 Act"), as amended by the Telecommunications Act of 1996 ("1996 Act").

Predictably, the ILECs oppose the institution of a negotiated rulemaking to further define the scope of their OSS obligations. They contend that the action requested would interfere with the framework of carrier negotiation and State public utility commission ("PUC") approval and enforcement contemplated by the 1996 Act. However, these carriers conveniently overlook the principal purpose of the 1996 Act — to promote competition in local and long-distance markets — and the clear role, confirmed by the Eighth Circuit, that the Commission has to play in tandem with the regime of voluntary negotiations, arbitration, and State regulation and enforcement. As a point of clarification, the rules the *Petition* seeks would not apply to voluntarily negotiated agreements unless specifically incorporated.

The record developed in the opening comments only serves to further underscore the need for Commission action. The failure of the ILECs to meet their OSS obligations, substantiated in detail in the *Petition*, was complemented by the accounts provided by numerous carriers attempting to enter the local exchange market. Accordingly, claims by the

ILECs that they are complying with their OSS duties, obviating the need for further action at this time, ring hollow.

A number of ILECs claim further that LCI and CompTel seek to "gold-plate" the ILECs' OSS functions, forcing them to upgrade and invest beyond their statutory obligations. In response, it bears repeating that CompTel and LCI merely seek further articulation of the Section 251(c)(3) obligations to provide OSS on a reasonable, nondiscriminatory basis. Realistically, this cannot be accomplished without the establishment of performance standards, including measurement criteria, default performance intervals, and reporting requirements to facilitate enforcement and evolution of OSS standards.

Finally, CompTel does not seek a "one size fits all" solution. CompTel supports the creation of a limited number of different tiers of interfaces to OSS functions which requesting carriers could choose. For rural ILECs and ILECs serving fewer than two percent of the nation's lines, CompTel supports a reasonable transition period and notes that such carriers are able to seek suspension or modification of any of the Section 251(c) requirements, which would include Commission rules to define the ILECs' OSS requirements.

For the foregoing reasons, the Commission should grant the *Petition* expeditiously and institute a negotiated rulemaking to adopt OSS performance standards, including measurement criteria, reporting requirements, default performance intervals, and remedial provisions. Additionally, consistent with LCI's proposal, the Commission should set a date of May 1, 1998, for industry efforts to reach consensus on technical standards. If consensus is *not* reached by that date, the Commission should take action to define standards within any remaining areas of dispute.

II. THE RECORD STRONGLY SUPPORTS GRANT OF THE RELIEF REQUESTED IN THE *PETITION*

A wide array of commenters support grant of the *Petition* and urge the Commission to conduct a rulemaking to set standards governing the type, nature and scope of the ILECs' OSS obligations, as well as the quality of access to such systems made available by ILECs to requesting carriers. As discussed in this section, the commenters specifically support the implementation of the five basic elements of the *Petition*. First, minimum performance standards will provide necessary benchmarks against which ILECs and their competitors alike can evaluate an ILEC's compliance with statutory OSS requirements. As an important first step, ILECs should be required to disclose the standard for each OSS function for which it has established performance standards for itself, along with historical data and measurement criteria. Second, measurement criteria with specific default intervals (and a "beta testing" period for the provisioning of OSS) and reporting requirements will benefit both ILECs and non-ILECs by enabling requesting carriers to hold ILECs to specific implementation schedules and providing ILECs with a standard against which to measure their OSS performance. Third, specific remedial provisions for non-compliance are necessary to enforce OSS standards adopted in the rulemaking and to compensate carriers injured by ILEC non-compliance with the Commission's OSS rules. Fourth, to develop the above-referenced default performance intervals, measurement criteria, and remedies, the Commission should charter a negotiated rulemaking with a neutral arbitrator and reasonable but strict timelines to accommodate full industry and both Federal and State government participation in the expeditious development of OSS requirements. Fifth, the Commission should facilitate the establishment of uniform OSS technical standards in an expeditious fashion by, *inter alia*, setting a reasonable target date for finalizing such standards, *i.e.*, May

1, 1998, before the Commission intervenes to resolve remaining disputes regarding technical standards left open at that point.

*A. **Minimum Default Performance Intervals.*** Many competitive local exchange carriers ("CLECs"), both large and small, as well as state PUCs and resellers, generally support grant of the *Petition's* request that the Commission conduct a rulemaking to codify minimum default OSS performance intervals.[3] These intervals would apply only to determine parity in cases where an ILEC has not articulated its own standards or reported performance in a meaningful way. As ALTS states, there are multiple public interest benefits to the Commission's establishment of minimum quantitative performance intervals for OSS, including trending ILEC performance over time and providing standardized benchmarks against which to measure ILEC treatment of individual CLECs with respect to OSS delivery and access.[4] A negotiated rulemaking on OSS will allow for the establishment of OSS performance intervals that will serve as a baseline for ILEC compliance and also give the Commission and State PUCs the ability to monitor and enforce timely and nondiscriminatory provisioning of OSS where ILECs have not yet articulated their own standards or reported performance in a meaningful manner.[5] Importantly, State regulators voice strong support for the adoption of "broad national standards" that "address both the

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[3] *See* ALTS Comments at 3-4; TCG Comments at 2-3; Time Warner Comments at 1-2; US One Comments at 1; ACSI Comments at 3-8; WinStar Comments at 8-9. Several interexchange carriers seeking to enter local markets voice support for the *Petition* as well. *See, e.g.*, MCI Comments at 1-6; Sprint Comments at ii; WorldCom Comments at 2; AT&T Comments at 11-12. Furthermore, State utility commissions and public interest groups also support initiation of an OSS rulemaking by the FCC. *See* California PUC Comments at 7; Wisconsin PSC Comments at 1; NARUC Comments at 3; CPI Comments at i. Resellers also support the *Petition*. *See* TRA Comments at 4-8; USN Comments at 1-5.

[4] *See* ALTS Comments at 3-4.

[5] *See* ACSI Comments at 7-8.

systems to which competitors should have access and the categories for performance standards."[6]

Commenters highlight the need for adoption of specific default performance intervals so that the industry and regulators can evaluate the quality of OSS functions that ILECs are providing and assess whether such functions are being made available on a nondiscriminatory basis.[7] As Time Warner demonstrates in its comments, it is not enough for the regulators to state that nondiscriminatory access to OSS is in general technically feasible and must be provided to CLECs.[8] In the absence of performance intervals, the enormous complexity involved in obtaining OSS access provides ILECs with endless opportunities to stymie local competition and competitive access to OSS by means of unfounded claims of "technical infeasibility" regarding the details of implementation.[9] As a vital initial step toward establishing minimum default intervals, numerous commenters agree that ILECs should be required to disclose the OSS functions for which they have adopted

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[6] California PUC Comments at 8. Additionally, the Public Service Commission of Wisconsin voiced strong support for mandatory disclosure of ILECs' performance standards and invited the Commission to provide additional guidance on "(1) the relative extent of automation expected; (2) interpretation of the meaning of 'substantially the same manner'; (3) necessary restrictions on changes to interfaces; and (4) time frames in which national standards, once adopted, must be implemented." Wisconsin PSC Comments at 1, 3; *see also* NARUC Comments at 3.

[7] CompTel concurs with AT&T and others that the proposed Local Competition Users Groups ("LCUG") measures and benchmarks be used as a reasonable basis for making evaluations of parity until the requested rulemaking can be completed. *See* AT&T Comments at 39.

[8] Time Warner Comments at 2.

[9] *See id.*; *see also* US One Comments at 1 (nondiscriminatory ordering, provisioning, and billing of unbundled elements on a completely automated basis is key to having any meaningful competition in the local exchange markets).

performance interval benchmarks, as well as the intervals themselves, historical performance data, and the measurement criteria used.[10]

B. Measurement Criteria and Reporting Requirements. The Commission also should adopt specific measurement criteria necessary to assess whether OSS is being implemented in a timely, reliable, and nondiscriminatory manner. The commenters join CompTel in broadly supporting the adoption of measurement criteria and standardized, regular reporting requirements to monitor OSS implementation.[11] Without specific measurement criteria, there is no way for new entrants or regulators to ensure that ILECs will comply with statutory nondiscriminatory OSS requirements.[12] Furthermore, the record shows that building periodic ILEC reporting requirements into OSS rules will accommodate ILEC concerns that standardized rules have sufficient flexibility to accommodate future changes and developments in ILEC OSS technology and provisioning methods.[13]

C. Remedial Provisions. The initial Comments also underscore the need to adopt specific remedial measures and penalties to enforce ILEC compliance with OSS standards codified as a result of the proposed rulemaking. Numerous commenters, like CompTel, called for conditioning retention of RBOC inter-LATA authority (once granted) on an ILEC's

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[10] *See, e.g.,* LCI Comments at 6-7, MCI Comments at 7 and WorldCom Comments at 11.

[11] AT&T Comments at 11-12, 22-25; MCI Comments at 3-4, 8; LCI Comments at 3; TCG Comments at 2-3; WorldCom Comments at 7-8.

[12] AT&T Comments at 11-12.

[13] *See* CPI Comments at 6; WorldCom Comments at 2, 8; AT&T Comments at 24; LCI Comments at 3. *Cf.* Bell Atlantic/NYNEX Comments at 3 (voicing concern that Commission-established OSS rules would be by definition too inflexible to keep pace with rapidly changing OSS requirements).

provisioning of OSS on a nondiscriminatory basis.[14] For instance, ALTS, MCI, and WorldCom join CompTel in recommending that incumbents failing to provide nondiscriminatory access to OSS should be prohibited from signing-up and serving new long distance customers until their provisioning of OSS access is brought to parity.[15] Such enforcement conditions should not be tied exclusively to the Section 271 process for RBOCs' seeking and retaining in-region inter-LATA authority. As ALTS notes, the remedy the Commission chooses to enforce its Section 251 requirements need only be reasonably related to the ILECs' motives for their unlawful actions and the scheme of the 1996 Act.[16]

The record also supports the imposition of monetary penalties for an ILEC's discriminatory provisioning of OSS. Assessing liquidated damages for CLEC injuries incurred due to ILEC violations of OSS-specific rules adopted by the Commission in this proceeding may help deter ILEC violations.[17] As a supplement, for any failure to meet OSS parity requirements, the Commission also may consider extending substantial credits to CLECs.[18] However, it must be emphasized that these monetary remedies alone will *not* be enough to deter ILEC discrimination because ILECs would most likely accept such penalties

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[14] *See, e.g.*, LCI Comments at 17-18, MCI Comments at 11; ALTS Comments at 16.

[15] *See* ALTS Comments at 16; MCI Comments at 11; WorldCom Comments at 3.

[16] ALTS Comments at 16. "[T]he breadth of agency discretion is, if anything, at [its] zenith when the action assailed relates primarily . . . to fashioning of policies, remedies and sanctions . . . in order to arrive at maximum effectuation of Congressional objectives." *Panhandle Eastern Pipe Line Co. v. F.E.R.C.*, 777 F.2d 739, 746-47 (D.C. Cir. 1985) (quoting *Columbia Gas Transmission v. F.E.R.C.*, 750 F.2d 105, 109 (D.C. Cir. 1984)).

[17] WinStar Comments at 10-11; *see also* CPI Comments at 12; Time Warner Comments at 13.

[18] MCI Comments at 11.

as a cost of doing business. Thus, experience strongly suggests that exclusive reliance on fines and forfeitures may serve as only a modest deterrent to anticompetitive ILEC behavior.[19]

D. Negotiated Rulemaking. The record also shows that the chartering of a negotiated rulemaking by the Commission, as suggested in the Commission's Public Notice, has the potential to facilitate rapid consensus building and accommodate full participation by the industry and Federal and State regulators in developing OSS policies and rules.[20] With strict time limits and a neutral facilitator,[21] a negotiated rulemaking has the potential to involve all interested parties more flexibly than a formal notice-and-comment rulemaking and should lead to the adoption of rules in a more efficient and expeditious manner.

E. Uniform Technical Standards. In order to keep OSS implementation on a timely schedule and accelerate the development of pro-competitive OSS arrangements, the Commission also set a reasonable target date for the adoption of uniform standards through industry efforts which have been ongoing even before the Commission's release of its *Local Competition Order*. Numerous commenters, including many ILECs, emphasize the value of establishing uniform technical standards.[22] In addition, technical standards should be

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[19] *See, e.g.*, ALTS Comments at 16.

[20] AT&T Comments at 37; CPI Comments at 8; LCI Comments at 4; MCI Comments at 13-14; GSA Comments at 13.

[21] *See* CPI Comments at i.

[22] *See, e.g.*, GTE Comments at 6; U S WEST Comments at 17; AT&T Comments at 33-34 (AT&T identifies three areas where technical standards are needed: (i) information requirements and business rules; (ii) mapping of information requirements and standard electronic data formats such as Electronic Data Interchange ("EDI") format; and (iii) uniform protocols for information transmission); Sprint Comments at 3; MCI Comments at 15.

flexible enough to accommodate the differing needs of various competitive carriers.[23] Setting a reasonable date certain for finalizing technical standards will maximize the likelihood of producing a timely, and hence efficacious, result.[24] LCI suggests that a reasonable initial date certain would be May 1, 1998, with the Commission to act, if necessary, no later than October 1, 1998, to adopt necessary technical standards.[25] CompTel concurs with these proposals.[26]

III. THE COMMISSION HAS STATUTORY AUTHORITY TO ADOPT AND ENFORCE THE RULES REQUESTED IN THE *PETITION*

Attempting to capitalize on the fact that review of the *Local Competition Order* was then pending, several ILECs opposed the *Petition* on the ground that the Commission lacks statutory authority to define OSS as a network element or to take enforcement action against ILECs who fail to comply with the OSS rules.[27] In particular, the ILECs argued that the definition and implementation of the network element regime under Section 251(c)(3) is left to state commissions pursuant to the negotiation and arbitration provisions in Section 252, and that the only available remedy is federal district court review pursuant to Section

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[23] LCI Comments at 7; MCI Comments at iii.

[24] LCI Comments at 7; Sprint Comments at ii.

[25] LCI Comments at 7.

[26] The suggestion by some ILECs, *e.g.*, USTA Comments at 7, that the Commission repudiated the notion of national standards in the *Second Report and Order on Reconsideration* is preposterous. As the Commission made clear in the decision, it merely declined to condition the requirement to provide access to OSS functions upon the creation of national standards. Moreover, the Commission reiterated its support for and intent to monitor the progress in establishing such standards by industry organizations.

[27] *E.g.*, BellSouth Comments at 19.

252(e)(6).[28] However, the recent decision by the Eighth Circuit in *Iowa Utilities Board* confirms that the Commission has authority under the 1996 Act to adopt the rules proposed by LCI and CompTel and to enforce those rules through Section 208 complaints and other proceedings.

A. The Commission Has Jurisdiction to Adopt the Requested Standards and to Define the Scope of the ILECs' OSS Obligations

Initially, CompTel would like to clarify that the *Petition* does not request rules that would apply to ILECs in situations where they are not subject to the network element and resale requirements of Sections 251(c)(3) and (c)(4). Where an ILEC is exempt from Section 251(c)(3) or (c)(4) as a rural carrier pursuant to Section 251(f),[29] or where an ILEC negotiates a voluntary agreement pursuant to Section 252(a)(1),[30] the rules requested in the *Petition* would not apply. The applicability of Commission rules adopted pursuant to Sections 251(c)(3), (c)(4), and (d)(2), would extend no further than the provisions themselves.

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[28] *E.g.*, Pacific Bell, Nevada Bell, and Southwestern Bell Telephone Company Comments at 10-11.

[29] This would appear to address a principal, but unfounded, concern of the Independent Telephone Telecommunications Alliance ("ITTA"). *See* ITTA Comments at 14. However, apart from permitting the exemption of smaller and rural carriers from Section 251(b) and (c) requirements pursuant to Section 251(f), the 1996 Act creates no basis for distinguishing among ILECs for purposes of basic obligations to provide unbundled network elements. Given the specific provisions of Section 251(f), it is fair to assume that Congress did not intend for such distinctions to be made.

[30] Thus, CLECs that have reached voluntary agreements regarding access to an ILEC's OSS will not be required to make additional investments, at least while their existing contracts remain effective. *See, e.g.*, USN Comments at 3-4. Unfortunately, if OSS is prescribed through arbitration, FCC regulations, or a combination of both, CLECs effectively may be forced by the ILEC in subsequent negotiations to make investments to access OSS in a manner which is consistent with such arbitrated results or rules.

The *Iowa Utilities Board* decision expressly affirmed the Commission's authority to adopt rules defining OSS as a required network element pursuant to Sections 251(c)(3) and (d)(2).[31] The Eighth Circuit stated that "the FCC is specifically authorized to issue regulations under subsection[] . . . 251(d)(2) (unbundled network elements)."[32] Section 251(d)(2) requires the Commission to define "what network elements should be made available" by ILECs.[33] To do so, and to facilitate its enforcement powers, CompTel submits, it is within the Commission's discretion to adopt the requested performance standards, measurement criteria, reporting requirements, and (if necessary) technical standards. In addition, the Eighth Circuit upheld the Commission's authority under Section 251(c)(4)(B) to adopt rules that "define[] the overall scope of the incumbent LECs' resale obligation."[34] As the Commission explained in the *Local Competition Order*, the OSS requirements were adopted to ensure ILECs complied with their nondiscriminatory resale obligations under Section 251(c)(4).[35]

Further, the broad scope of the Commission's authority to implement the network element provisions in the 1996 Act is shown by the rules which the Eighth Circuit did not vacate and which remain in full force and effect. The Court upheld the Commission's rules defining OSS as a network element and requiring ILECs to provide nondiscriminatory access

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31 *Iowa Utilities Board* at 130-134.

32 *Id.* at 119 n.23; *see also id.* at 103 n.10.

33 47 U.S.C. § 251(d)(2).

34 *Iowa Utilities Board* at 152-53; *see also id.* at n.10 (FCC has authority to issue regulations under Section 251(c)(4)(B)).

35 *Local Competition Order*, ¶¶ 516-17.

to "the pre-ordering, ordering, provisioning, maintenance and repair, and billing functions of the incumbent LEC's operations support systems."[36] The Court also upheld rules including:

- the requirement that ILECs provide to requesting telecommunications carriers nondiscriminatory access to unbundled network elements in accordance with the Commission's rules (47 C.F.R. § 51.307(a)).

- the requirement that ILECs provide to requesting telecommunications carriers access to unbundled network elements "in a manner that allows the requesting telecommunications carrier to provide any telecommunications service" (47 C.F.R. § 51.307(c)).

- a prohibition against limitations, restrictions or requirements imposed by ILECs upon request for or the use of unbundled network elements by requesting telecommunications carriers (47 C.F.R. § 51.309(a)).

- the recognition that a requesting telecommunications carrier may use unbundled network elements to provide exchange access to itself in order to provide interexchange services to subscribers (47 C.F.R. § 51.309(b)).

- the requirement that ILECs must ensure that the quality of network elements provided to one requesting telecommunications carrier is the same as the quality provided to other requesting carriers (47 C.F.R. § 51.311(a)) and the quality provided by the ILEC to itself (47 C.F.R. § 51.311(b)).

- a requirement that ILECs establish nondiscriminatory terms and conditions for providing unbundled network elements to all requesting telecommunications carriers (47 C.F.R. § 51.313(a)).

- a requirement that the terms and conditions of providing network elements to requesting carriers, including but not limited to the provisioning time intervals, shall be no less favorable to the requesting carrier than the terms and conditions which the ILEC provides such elements to itself (47 C.F.R. § 51.313(b)).

Based upon the *Iowa Utilities Board* decision, the broad scope of the Commission's network element rules,[37] and the authority of the Commission to identify and define "what network

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[36] 47 C.F.R. §§ 51.313(c) and 51.319(f).

[37] The only network element rules struck down by the Court have nothing to do with the relief requested in the *Petition*. Those rules involve the meaning of the term "technically feasible" in Section 251(c)(3) and the Commission's interpretation of Section 251(c)(3) to require ILECs to combine elements upon request.

elements should be made available for the purposes of [Section 251(c)(3)],"[38] the Commission plainly has authority to adopt each and every rule requested by the *Petition*. With respect to ILECs' Section 251(c)(4) resale obligations, the Commission's OSS requirements merely help define the overall scope of those obligations, which the Court confirmed the Commission had the authority to do.

In addition to the rulemaking authority described above, the Commission, for purposes of Section 271 applications, has both the ability and the duty, to define OSS requirements for purposes of measuring RBOC satisfaction of the fourteen-point checklist.[39] Concomitantly, the Commission's authority pursuant to Section 271 extends to suspension or recision of an RBOC's in-region inter-LATA authority if OSS is not provided consistently with Section 251(c) requirements.

B. Section 208 Grants the Commission Authority to Enforce Its OSS Rules

Further, the Commission should clarify that it has plenary authority to enforce its OSS *rules* through Section 208 complaints and other federal proceedings (*e.g.*, forefeitures). The Court's ruling that the Commission lacks Section 208 authority to review *agreements* approved by State PUCs or to enforce the *terms of such agreements* does not apply here.[40] CompTel and LCI are not asking the Commission to review or enforce State-approved or arbitrated agreements. Rather, we request only that the Commission exercise its statutory

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[38] 47 U.S.C. § 251(d)(2). The *Petition* does not seek to establish the methodology for pricing OSS functions, but "merely [to] define[] the overall scope of the incumbent obligation," similar to the way in which the FCC rule on resale of promotional offerings does. That regulation, Section 51.613 of the Commission's rules, was upheld by the Eighth Circuit. *Iowa Utilities Board* at 152-53.

[39] 47 U.S.C. §§ 271(c)(2)(ii) and (xiv).

[40] *Iowa Utilities Board* at 120-123.

authority to adopt rules defining the scope of ILEC obligations under the network element regime pursuant to the 1996 Act and to enforce those rules against non-compliance by ILECs, to the extent each ILEC is subject to them. Regardless of whether an ILEC is acting contrary to or consistent with its obligations under state-approved or arbitrated agreements, the Commission has clear statutory authority under Section 208 to enforce its own rules even if incorporated into those agreements.[41]

There may be some ambiguity whether the *Iowa Utilities Board* decision addresses the Commission's general authority to implement and enforce Section 251.[42] However, the Commission need not resolve that ambiguity in order to grant the relief requested in the *Petition*. Leaving aside whether the Commission has authority under Section 208 to enforce statutory provisions for which it lacks rulemaking authority, it cannot be doubted that the Commission retains plenary Section 208 authority to resolve disputes regarding statutory provisions which Congress has expressly required the Commission to implement. The Court underscored that it was not questioning "the FCC's authority to prescribe and enforce regulations" to implement the network element provisions "where Congress expressly called for the FCC's participation."[43] With regard to State authority, the Eighth Circuit declared that "the state commissions' plenary authority to accept or reject these agreements necessarily

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[41] Section 252(e)(2)(b) requires approved arbitrated agreements to be consistent with Commission's Section 251 rules. Thus, the failure of an ILEC to comply with OSS standards in an agreement approved pursuant to Section 252(e)(2)(B) would give jurisdiction to the State PUC to enforce the agreement *and* to the Commission to enforce its own rules.

[42] The Court, while recognizing that the Commission asserted Section 208 jurisdiction to hear "disputes over the implementation of the requirements of sections 251 and 252," limited its holding to a rejection of the Commission's authority to "review state commission determinations or to enforce the terms of interconnection agreements under the Act." *Iowa Utilities Board* at 121.

[43] *Id.* at 127.

carries with it the authority to enforce the provisions of agreements that the state commissions have approved."[44] So too for the Commission: its plenary authority to adopt rules implementing the network element regime under Sections 251(c)(3) and (d)(2) necessarily carries with it the authority to enforce that regime through Section 208. That result is the only one consistent with the plain language of Section 208, which expressly authorizes (and indeed requires) the Commission to hear and resolve complaints regarding the ILECs' non-compliance with the Commission's regulations, including any regulations properly adopted pursuant to Section 251(d)(2). Inasmuch as the 1996 Act did not amend Section 208, the Commission's Section 208 authority to enforce its OSS rules cannot reasonably be doubted.

IV. THE ILEC COMMENTS DO NOT REPUDIATE THE NEED FOR THE REQUESTED RELIEF

While it is not surprising that the ILECs oppose granting the *Petition*, it is equally clear that the ILECs do not maintain that they have disclosed their internal OSS performance standards to CLECs that purchase unbundled network elements or wholesale services. Further, the ILECs do not seriously contest that, without knowledge of such standards, regulators and competitors will be unable to enforce Sections 251(c)(3) and (c)(4) of the 1996 Act, the Commission's OSS rules, or the OSS provisions of approved agreements efficiently and effectively. Thus, a key component of the relief sought by LCI and CompTel — that ILECs disclose the OSS functions for which they have standards, those OSS functions for which they have not established performance intervals for themselves, and the standards,

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[44] *Id.* at 122.

historical data, and measurement criteria where such standards have been adopted — essentially was unopposed.

Rather, the ILECs make four basic arguments against the *Petition*, none of which provides a basis for denying the relief requested. First, the ILECs attempt to distort the Commission's important statutory role, confirmed by the Eighth Circuit, in ensuring that CLECs have access to reasonable and nondiscriminatory OSS. They contend that CLECs are to rely, for all practical purposes, solely upon voluntary negotiations with ILECs, State PUC arbitration, and State enforcement of approved agreements. Second, the ILECs' claims that they have been meeting their obligations to provide OSS on a parity basis are refuted by the substantial record that has been developed to the contrary. Third, contrary to the claims of the ILECs, CompTel and LCI are not seeking a "gold-plated" set of performance standards. Rather the *Petition* and its supporters seek minimum default performance intervals, measurement criteria, and reporting requirements that will make practical enforcement of the ILECs' OSS obligations a reality. Finally, the *Petition* does not seek a one-size-fits-all approach, but acknowledges the legitimacy of variations in performance standards and in the means of access to OSS functions. CompTel also notes that certain accommodations may be available for rural and smaller ILECs.

A. Grant of the *Petition* Will Advance the Principal Purposes of the 1996 Act

The promotion of competition in both local exchange and long distance markets is the cornerstone of the 1996 Act.[45] As the Eighth Circuit noted, Congress imposed three duties upon ILECs in order to achieve the goals of competition, lower prices, and higher

[45] Section 101 of the 1996 Act, which added Sections 251-261 to the Communications Act of 1934 is entitled "Development of Competitive Markets."

quality services. Specifically (and as the Eighth Circuit emphasized), the 1996 Act requires ILECs to permit requesting carriers to (1) interconnect with the ILECs' local network, (2) have just, reasonable and nondiscriminatory access to individual, unbundled network elements for the provision of telecommunications services, and (3) purchase retail telecommunications services at wholesale rates for purposes of resale.[46] As explained the *Petition*, the Commission found in the *Local Competition Order* that OSS functions and interfaces to OSS are essential to the development of competition.[47] Accordingly, the Commission defined OSS as an unbundled network element that ILECs must make available to requesting carriers.[48]

The framework established by the 1996 Act to implement these objectives and ILEC obligations is two-fold, as recognized by the Eighth Circuit. First, the 1996 Act contemplates a system of bilateral agreements between ILECs and other telecommunications carriers through which the three duties outlined above would be carried out. Where such agreements are negotiated, CompTel recognizes that the 1996 Act provided that ILECs are not bound by the obligations in Sections 251(b) and (c) of the 1934 Act.[49] As a result, the relief requested in the *Petition*, based upon the Commission's authority to regulate the scope and availability of OSS as an unbundled network element in Sections 251(c)(3) and (d)(2) and to define the ILECs' overall obligation to make services available for resale in Section

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[46] *Iowa Utilities Board* at 96-97. *See also* 47 U.S.C. §§ 251(c)(2)-(4). The wisdom of Congress in imposing these duties is reinforced by a review of the initial comments of the ILECs, several of which audaciously suggest that if the CLECs do not like how the ILECs are providing OSS, they can build their own networks. *See, e.g.*, GTE Comments at 28.

[47] *Petition* at 3 (citing *Local Competition Order*, ¶¶ 516, 521-22).

[48] *Local Competition Order*, ¶ 516.

[49] *See* 47 U.S.C. § 252(a)(1).

251(c)(4), would not apply to such voluntary agreements. However, to the extent submitted for arbitration, agreements between ILECs and requesting carriers *are* subject to the obligations in Sections 251(b) and (c). Consequently, when attempting to negotiate agreements with ILECs, requesting carriers can rest assured that, at a minimum, they will have available to them through arbitration the unbundled network elements assured by Section 251(c)(3), if they are not satisfied with the offer the ILEC has put on the table. By giving requesting carriers this safety net, which extends to numerous aspects of Sections 251 and 252, Congress sought to offset the unequal bargaining power of the parties.

Second, the 1996 Act provides the Commission with the authority to establish regulations to implement, at a minimum, specific portions of Section 251.[50] These include, of course, regulations establishing what ILEC OSS functions competitors must have access to and, as detailed above, what constitutes access to these functions in a just, reasonable, and nondiscriminatory manner.

The two halves of this approach converge when an arbitrated agreement is submitted to the appropriate State PUC for approval.[51] In particular, State PUCs may

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[50] *See Iowa Utilities Board* at n. 10 and accompanying text. CompTel believes that the Eighth Circuit incorrectly narrowed the Commission's rulemaking authority under Section 251(d)(1) of the Act. However, the Eighth Circuit decision correctly upheld the authority of the Commission to define the unbundled network elements that ILECs must make available and the nature and scope of that obligation. *See*, *supra*, Section III A.

[51] The ILECs' arguments that Congress wanted to rely principally on negotiated agreements to facilitate competition is a cynical attempt by the ILECs to preserve their market power. ILECs should, and do, have the flexibility to seek individual terms for different requesting carriers. But the ILECs conveniently ignore the fact that Congress specifically provided for the Commission to define the scope and nature of OSS requirements, and explicitly required (in the event that negotiations fail) that OSS be made available on a just, reasonable, and nondiscriminatory basis. In short, the 1996 Act, in an effort to ensure that new competitors would be full-fledged co-carriers, provided numerous protections to new entrants that were designed to counter-balance the ILECs' inherent

(continued...)

approve arbitrated agreements only if they are consistent with the Commission's regulations implemented under Section 251.[52] In other words, while the framework of negotiations, arbitrations and State PUC approval of agreements for interconnection, unbundled network elements, and wholesale services are an important means to promote competition, the Act makes very clear that — at least with respect to selected areas of Section 251 — the Commission does have a critical, active role in providing State PUCs with guidelines to which they must adhere when reviewing arbitrated agreements for approval. Without debate, one of these is OSS, including the particular functions and the access thereto that ILECs must make available.

Accordingly, the contentions of numerous ILECs in the initial comments that the Commission's further articulation of the ILECs' obligations to make OSS available on just, reasonable, and nondiscriminatory terms and conditions would interfere with the framework envisioned in the 1996 Act is simply wrong. The Commission has a role no less important than that of the State PUCs, and the *Petition* merely urges the Commission to assume that role. It does not ask the Commission to hop the fence into areas which Congress may not have invited it. As CompTel already has made plain, negotiated agreements would not be subject to the performance standards and measurement criteria being requested, unless the parties specifically incorporated them into their contracts. However, where negotiations fail,

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[51](...continued)
advantage in voluntary negotiations. As the comments reveal, the wisdom of this approach is underscored by the continuing tendency of the ILECs to treat new entrants as second class carriers, or even "end users." *See, e.g.*, GTE Comments at iii, 7 (characterizing CLECs as "customers").

[52] 47 U.S.C. § 252(e)(2)(B).

the Commission is empowered to define the nature and scope of the ILECs' duty to provide OSS pursuant to Sections 251(c)(3) and (c)(4).[53]

B. There is Substantial Evidence in Addition to That in the *Petition* of Continuing Discrimination by ILECs in the Provisioning of OSS

The *Petition* provides overwhelming evidence and numerous examples of ILEC discrimination in the provision of OSS that, without more, would justify the call for the requested Commission action.[54] Yet the initial comments provide many more examples of ILEC discrimination. This expansive evidence of continuing ILEC non-compliance with Section 251(c) obligations further underscores the urgent need for specific rules to promote just, reasonable, and nondiscriminatory access to ILEC OSS functions.

For example, as Kansas City Fibernet observes, there has been a broad failure by the ILECs to provide data in a form that permits competitive carriers to order and bill without manual intervention — it is not conceivable that ILECs would impose such manual intervention requirements in provisioning OSS to their own customers.[55] The net effect of manual provisioning, as opposed to much speedier electronic ordering processes for OSS, is that the ILECs are able to delay competitive provisioning of OSS functions for non-ILEC competitors. As a result, Kansas City Fibernet for now has chosen not to enter the local

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[53] Under the *Iowa Utilities Board* decision, the prices ILECs charge for OSS are to be set by the State PUCs should the parties fail to agree upon rates. The Commission, however, retains authority to determine the nature and scope of the OSS obligation. *Cf. Iowa Utilities Board* at 153-54 (FCC has authority to define the scope of the resale obligation).

[54] *See Petition* at 34-84.

[55] *See* Kansas City FiberNet Comments at 4.

exchange market, although authorized in Illinois and New York, for fear that the current state of OSS will make it too difficult to compete for customers.[56]

WinStar Communications relates that Pacific Bell's failure to provide electronic OSS preordering processes has delayed processing of WinStar's OSS orders up to five weeks.[57] WinStar also documents multiple OSS-related billing problems it has experienced due to ILEC non-performance or inadequate performance including: Ameritech's regular failure to produce billing records and provision of billing data in unusable formats; BellSouth's mixing of rated and unrated billing data; and in recording resold line transactions, Bell Atlantic's incorrect identification of WinStar rather than the retail customer as the line's user of record.[58] In addition, KMC and RCN describe a series of delays at the hands of BellSouth's manual OSS order placement system as well as service failures with respect to NYNEX's OSS provisioning through the use of its web graphic user interface.[59]

Another CLEC, ACSI, states that the current ILEC practices in OSS provisioning have led to unacceptable provisioning intervals, human error and troublesome maintenance and repair delays.[60] Specifically, ACSI reports that BellSouth was able to cripple ACSI's initial entry into Georgia by not providing equal access to OSS.[61] ACSI also shows that U S WEST has hindered the development of local competition by limiting the OSS gateway purportedly designed by U S WEST for CLEC access to inadequate performance levels and

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56 *Id.* at 1-2.

57 WinStar Comments at 4.

58 *Id* at 7-8.

59 KMC and RCN Comments at 2-3.

60 ACSI Comments at 4.

61 *Id.* at 5-6.

subpar functionality.[62] Other examples of ILEC failures to meet their OSS obligations appear in the initial comments.[63]

Predictably, the ILECs claim that they are complying with Section 251 and the *Local Competition Order* OSS requirements.[64] However, in light of the record of specific instances to the contrary, the claims by ILECs that they are meeting the statutory standard for just, reasonable, and nondiscriminatory access to OSS ring hollow. Rather, the weight of evidence presented in the *Petition* and comments convincingly establishes the need for expeditious formulation of specific Commission rules to promote nondiscriminatory access to OSS and to allow the development of procompetitive OSS arrangements.

C. The *Petition* Seeks Nothing More Than Appropriate Rules for Enforcement of the Requirements of Section 251(c)

As discussed earlier, the Commission has the jurisdiction under Sections 251(c)(3) and (c)(4) to define the scope of the ILECs' obligations to make available OSS access. Contrary to the claims of some ILECs, the *Petition* seeks to do no more. Sections 251(c)(3) and (c)(4) require access to OSS functions on terms and conditions that are just, reasonable, and nondiscriminatory. Thus, for OSS to be made available as contemplated by Sections 251(c)(3), (c)(4), and (d)(2), it must meet a parity standard, *i.e.*, it must be provided on a

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62 *Id.* at 7-8.

63 *See, e.g.*, AT&T Comments at 10-11 (SNET proposed no performance measurements for certain pre-ordering functions and inadequate reports that aggregate the reporting of its performance for both the provision of resale services and unbundled elements); MCI Comments at 5 (MCI faced delays in PacBell processing of OSS orders on *average* of 29 days from the time it submitted resale orders to PacBell to the time the orders were completed).

64 *See, e.g.*, GTE Comments at ii, Ameritech Comments at 7-8, BellSouth Comments at 15.